Jurisdictional Statement

81-1856

Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 81-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SUMTER COUNTY SCHOOL DISTRICT, et al.,

Appellants,

v.

JUDSON EDGE, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Should this Court's decision in McDaniel v. Sanchez, 101 S. Ct. 2224 (1981) be applied retroactively?

PARTIES TO THE PROCEEDING

Parties to this proceeding in the district court were as follows:

Plaintiffs: Judson Edge, Ronald J. Foust, Georgia L. Deriso, David W. Tietjen, and Arthur Watts.

Defendants: Sumter County School District; Sumter County Board of Education; Jack Deriso, individually and as Chairman of the Sumter County Board of Education; Marvin McNeill, Ed Hutchinson, E.J. Satterfield, J.N. Cook, Martha Wise, and Dan Parker, individually and as members of the Sumter County

Board of Education; Sue R. Smith, individually and as Judge of the Probate Court of Sumter County, Georgia.

The United States of America is participating as amicus curiae.

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No. 81-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SUMTER COUNTY SCHOOL DISTRICT, et al.,

Appellants,

v.

JUDSON EDGE, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

The Sumter County School District appeals from the orders of the district court dated November 25, 1981 and January 4, 1982 and submits its jurisdictional statement to show that this Court has jurisdiction and that a substantial question is presented.

OPINIONS BELOW

The opinion and order of the United States District Court for the Middle District of Georgia, dated November 25, 1981, is unreported and is appended at 1a. The court's order overruling defendant's Rule 59 motion was entered on January 5, 1982 and is appended at 10a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This action for declaratory and injunctive relief was brought under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States and under the following provisions of the United States Code: 28 U.S.C. §§ 1343(3) and (4), 2201, and 2284 and 42 U.S.C. §§ 1971(a)(1), 1973, 1973c and 1983. Plaintiffs brought the action seeking to abolish the present at-large method of election of members of the Sumter County Board of Education

and to have a "fairly apportioned" district plan imposed.

The order sought to be reviewed was entered on December 1, 1981. The order denying defendants' motion pursuant to Rule 59 of the Federal Rules of Civil Procedure was entered on January 5, 1982. The notice of appeal was filed on February 3, 1982 in the United States District Court for the Middle District of Georgia.

Jurisdiction of the appeal is conferred on this Court by 42 U.S.C. § 1973c, Allen v. State Board of Elections, 393 U.S. 544 (1969).

STATUTORY PROVISIONS INVOLVED

This appeal involves the question as to whether or not Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c) applies to a state statute (1973 Ga. Laws

2127) establishing the method for electing members of the Sumter County Board of Education. Copies of these statutes are appended at pages 37a and 41a respectively.

STATEMENT OF THE CASE

The plaintiffs filed suit on April 25, 1980 contending that the plan under which school board members are currently elected is in violation of § 5 of the Voting Rights Act of 1965 because the plan was never "pre-cleared" by the United States Department of Justice. After this Court's decision in McDaniel v. Sanchez, 101 S. Ct. 2224 (1981), the district court granted summary judgment in their favor, held that the 1973 at-large plan is null and void for failure to comply with § 5 of the Voting Rights Act, and enjoined further use of the plan to elect board members.

The voting plan in question resulted from an Opinion (12a) of the district court in the case of Carter v. Crenshaw (M.D. Ga. July 12, 1972). In a subsequent Interim Order (31a) of July 20, 1972, the district court gave the defendants in that case (members of the Sumter County Board of Education at that time) until July 1, 1973, to eliminate or validly modify the malapportioned education districts as outlined in the court's opinion of July 12, 1972. At that time, a consolidation referendum was pending which, if approved, would have merged the school systems of Sumter County, Georgia, and the City of Americus, Georgia. The opinion stated that if the consolidation referendum passed, the controversy would become moot. On the other hand, if the consolidation proposal were defeated, it was "presumed" that

the Georgia General Assembly would "do whatever is necessary . . . to eliminate the problem." Two specific methods suggested by the court were redefining the education districts to bring any population disparities within limits permissible under the one-man, one-vote cases or providing for the election of members of the Board on an at-large basis.

The consolidation referendum was defeated, and the legislative delegation from Sumter County had the General Assembly pass a local act to provide for election of board members on an at-large basis. This plan was ratified by the voters of Sumter County on April 24, 1973.

In May of 1973, the plan was submitted to the Justice Department; and on July 13, 1973, the Attorney General interposed an objection. However, counsel for the Sumter County Board of Education corresponded

further with the Attorney General, contending in a letter dated July 24, 1973, that under the holding of Connor v. Johnson, 402 U.S. 690 (1971), a decree of a United States District Court is not covered by Section 5 of the Voting Rights Act and that therefore the initial submission to the Justice Department was neither necessary nor proper. The Attorney General took issue with this position in a letter dated September 12, 1973. No further action was taken by the plaintiffs in Carter v. Crenshaw, and that case was dismissed by the district court on May 10, 1974, based upon its having become moot by the passage of time. No action was taken by the government to follow up on the position espoused by the Attorney General in his letter.

Based upon its contention that the plan was not covered by § 5, the Sumter

County Board of Education continued to utilize the at-large plan, which was the plan in use at the time this action was filed.

Against the backdrop of Carter v. Crenshaw, the defendants in the instant action responded to the plaintiffs' motion for summary judgment by arguing that the 1973 plan was not a "change covered by § 5." At the time that the response was filed, decisions of this Court on the question of what is and what is not subject to § 5 of the Voting Rights Act were rather confusing. However, the only decision existing at the time the 1973 plan was developed simply held that a decree of a United States District Court "is not within reach of Section 5 of the Voting Rights Act." Connor v. Johnson, 402 U.S. at 691.

On June 1, 1981, this Court decided McDaniel v. Sanchez, 101 S. Ct. 2224

(1981), holding that when a plan is developed by a legislative body in response to a federal court order and is not actually drawn up and ordered into effect by the court, the plan is required to be pre-cleared under § 5 of the Voting Rights Act.

After the ruling in McDaniel v. Sanchez, defendants argued to the three-judge court that the holding in that case should not be applied retroactively and that the 1973 plan should be judged based on the law according to the interpretations by this Court extant in 1973. Briefs on this question were submitted by the defendants, the plaintiffs, and the United States as amicus curiae.

The three-judge court issued its Opinion and Order on November 25, 1981, granting plaintiffs' motion for summary judg-

ment. The court held that although the voting plan under attack was "doubtless the result of the Court's 1972 order in Carter v. Crenshaw," it was not "the action of the Court nor was it directed by the Court." The court then applied the holding in McDaniel v. Sanchez, and concluded that the 1973 plan was subject to the preclearance requirements of Section 5. The court made no mention of the retroactivity question.

The defendants moved for reconsideration under Rule 59 seeking to set aside that order on the grounds that the election plan in question was indeed ordered by the district court in the case of Carter v. Crenshaw, according to the case law applicable in 1973, and that, because the plan was not within reach of § 5 of the Voting Rights Act at the time it was enacted, the court

should address the question of retroactive application of McDaniel v. Sanchez.

By order dated January 4, 1982, and filed January 5, 1982, the court denied the defendants' Rule 59 motion.

Defendants' Notice of Appeal to this Court was filed on February 3, 1982.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The effect of the district court's order in this case is to attach legal consequences to acts taken in 1973 which were premised "on a different understanding of . . . judge-made law from the rule that ultimately prevailed." Lemon v. Kurtzman, 411 U.S. 192, 198 (1973) (plurality opinion). This decision is in error when tested against the doctrine of non-retroactivity as applied by this court in civil litigation. Moreover, it could adversly impact numerous voting plans

which grew out of reapportionment and/or dilution suits that were not "court-ordered" under current precedent, and which were never pre-cleared under § 5 of the Voting Rights Act.

I.

The at-large election plan adopted for use in Sumter County in 1973 was clearly "court-ordered" under the law prevailing at that time. The district court's position that although the plan was doubtless the result of the court's 1972 order, it was not the action nor at the direction of the court begs the question. We now know by virtue of clarity of hindsight that a reapportionment plan is not "court ordered" if it grows out of a proposal reflecting policy choices of the elected representatives of the people. McDaniel v. Sanchez, 101 S.Ct. at 2238.

However, in 1973 the only decision of this Court discussing pre-clearance requirements vis-a-vis decrees of United States district courts was Connor v. Johnson, 402 U.S. 690 (1971). In that case, this Court stated quite simply that "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act." Id. at 691.

In Zimmer v. McKeithen, 467 F.2d 1381 (5th Cir. 1972) (decided shortly after the district court's order in Carter v. Crenshaw but before the at-large plan in question was adopted), the court of appeals considered a case in which a district court had before it several plans of re-apportionment submitted by parties to the litigation. The district court adopted the plan which it considered "more satisfactory than any other." Id. at 1382.

On appeal, the plaintiffs argued that the district court was without power to order the at-large portion of the plan because the Attorney General had objected to Louisiana statutes which would have permitted at-large elections for school boards and police juries and that this objection was binding on the district court. In response to this argument, the court of appeals made the following ruling:

> It must be noted that this is not a case in which a legislature, board, or commission attempted to reapportion itself. In such a case, Section 5 clearly applies. What we have here is an adversary action, invoking the equity jurisdiction and the equitable adjudication of the District Court. As the Supreme Court succinctly said in Connor v. Johnson, 402 U.S. 690, 91 S. Ct. 1760, 29 L. Ed. 2d 268, and as this Court said in Sheffield v. Itawamba County Board of Supervisors, 5 Cir., 1971, 429 F.2d 35, court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5. If this were not so, the exercise of juris-

> diction by the courts would be meaningless. The Attorney General has no authority to review or to set aside the judgments of courts duly entered in the exercise of their jurisdiction over the parties and the subject matter (emphasis in original).

Zimmer v. McKeithen, 467 F.2d at 1383.

A comparison of the transcript of the hearing held in Carter v. Crenshaw on June 28, 1972, with the district court's opinion and interim order demonstrates that the plans set forth by the court as being acceptable were among those suggested at the hearing by counsel for defendants. The Sumter County Board of Education has no authority to reapportion itself,[1] and the

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[1] Ga. Const. Art. VIII, §V, ¶II provided that the composition and method of choosing boards of education "may be changed by local or special law conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon." This provision has been included in Art. VIII, §V, ¶II of the Constitution of Georgia of 1976 (Ga. Code Ann. §2-5302). A "local law" in Georgia is one passed by the General Assembly for the benefit of counties, cities, towns, etc.

plan adopted arose out of adversary proceedings. There was therefore ample precedent for the position taken by the defendants in 1973 that the plan was "court ordered" and therefore not subject to preclearance.

After 1973 there were a number of decisions on this subject which fell "considerably short of providing clear guidance to the courts that initially address this difficult issue." McDaniel v. Sanchez, 448 U.S. 1318, 101 S.Ct. at 9 (1980) (opinion of Justice Powell recalling mandate and granting stay). The Zimmer decision discussed above was reversed on other grounds by the court of appeals en banc in a decision which did not address the Section 5 question. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). In turn this Court affirmed the court of appeals in the decision which contains the

footnote that was later disavowed in Sanchez. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). Subsequently, Wise v. Lipscomb, 437 U.S. 535 (1978), went off on the issue of whether the body in question had the power to reapportion itself. However, at the time the plan under consideration was adopted in 1973, none of these distinctions had arisen; and the rule simply was that apportionment plans resulting from equitable jurisdiction over adversary proceedings were not subject to Section 5 of the Voting Rights Act.

II.

This court has considered three separate factors when dealing with the non-retroactivity question in civil litigation:

1. The decision must establish a new principle of law by overruling clear

past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

2. The Court weighs the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation;

3. The Court determines whether retroactive application could produce substantial inequities which should be avoided.

Chevron Oil Company v. Huson, 404 U.S. 97, 106-07 (1971).

When tested against these factors, the Sanchez decision should clearly not be given retroactive affect. The court decided for the first time in that case that § 5 of

the Voting Rights Act applies to a reapportionment plan submitted to a federal district court in response to a judicial determination that the existing apportionment of election districts was unconstitutional. That decision was "not a case in which the language of the controlling statute unambiguously answers the question presented. " 101 S. Ct. at 2234. Again, and with the clarity of hindsight, we know that neither East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), or Wise v. Lipscomb, 437 U.S. 535 (1978), foreshadowed this decision, but in fact those cases only added to the confusion which was ultimately resolved in Sanchez.

The court therefore turned to the legislative history of the 1975 Voting Rights Act amendment and determined that the answer to the problem was to be found in the "crystal clear" language of a senate commit-

tee report. However, the court did not discuss the original intent of Congress when the Voting Rights Act was passed in 1965, nor did it discuss the legislative history of the 1970 amendments. The 1975 amendments and their accompanying legislative history came several years after the litigation in Carter v. Crenshaw which produced the plan in issue here.

Turning to the purpose, reliance and effect criteria, it appears from reading McDaniel v. Sanchez that the purpose of the new standard is to provide for "centralized review" and to allow problems to "be resolved in a consistent and expeditious way." 101 S. Ct. at 2237 (footnote omitted). In addition, this Court seemed concerned that jurisdictions covered by the acts "could avoid the normal pre-clearance procedure by awaiting litigation challenging a refusal to

redistrict after a census is completed." Id. These purposes would not be served by retroactive application. It would be futile to be concerned in 1982 with jurisdictions affected by the 1970 census, since a new census has only recently been completed. Most jurisdictions are just now getting around to devising reapportionment plans pursuant to the 1980 census, so it is highly unlikely that any covered jurisdictions have had time to refuse to redistrict. In addition, it does not appear that any purpose would be served by requiring governmental decisions previously approved by federal district judges to be reviewed by the Department of Justice many years later. Because of inevitable changing conditions, such a procedure would in effect constitute the Justice Department a "super legislature" throwing out

plans which had no adverse effect or objections at the time they were adopted.

With regard to reliance, it is clear that the defendants in this case relied upon Connor v. Johnson, the only decision of this court which had at the time discussed the applicability of § 5 to court-ordered plans. Distinctions between "court ordered" plans and "court approved" plans did not begin to appear until Wise v. Lipscomb, 437 U.S. 535 (1978), some five years after the adoption of this plan. There are a number of situations in other jurisdictions covered by the Act in which plans were adopted at the direction of federal district courts or resulted from settlements and were never submitted for pre-clearance. All of these officials (and their lawyers) undoubtedly relied in good faith upon the belief that, under then existing court decisions, there was no requirement to submit the plans for pre-clearance.

Retroactive application of McDaniel v. Sanchez would not only be inequitable under the circumstances of this and numerous other cases, but it would involve a substantial adverse impact unpon the administration of justice. The doors of federal courts throughout covered jurisdictions would be opened for disgruntled citizens to challenge voting plans which have been in existence for many years on the grounds that the plans were never pre-cleared under § 5. This would require the designation of three-judge panels to adjudicate the coverage questions, and, assuming those panels found the cases to be within the ambit of McDaniel v. Sanchez, would then require submissions to the Department of Justice. The Justice Department would then be second guessing plans approved years ago by federal judges. Retroactive application in this fashion would

be inconsistent with our time honored doctrines of separation of powers and of an independent judiciary. Plans which have already passed muster in the federal judiciary would now be subject to review by the Attorney General.

Although this Court did not specifically comment on the question of retroactivity in deciding McDaniel v. Sanchez, its heavy reliance on the language in the Senate Committee Report on the 1975 Amendments implicitly indicates that it did not intend that the decision be given retroactive effect. Part of the language quoted from S. Rep. No. 94-295, 94th Cong., 1st Sess., 18-19 (1975) contains guidelines which will prevent "second-guessing" by the Justice Department of federal court orders in the future:

> "In the typical case, the court either will direct the governmental body to adopt a new plan and present it to the court for consideration or else itself choose a plan from among those presented by various parties to the litigation. In either situation, the court should defer its consideration of - or selection among - any plans presented to it until such time as these plans have been submitted for Section 5 review. Only after such review should the district court proceed to any remaining fourteenth or fifteenth amendment questions that may be raised."

McDaniel v. Sanchez, 101 S. Ct. at 2235. However, this guidance is of absolutely no benefit regarding voting plans arising out of litigation prior to McDaniel v. Sanchez. Courts have already acted and cannot now "defer" consideration of plans adopted in the past. We respectfully submit that this Court would certainly have addressed the question of how to deal with situations where district courts did not defer their actions had it intended for McDaniel v. Sanchez to have retroactive effect.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction and settle important questions regarding the application of Sanchez to prior "court-ordered" redistricting plans.

Respectfully submitted,

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Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

JUDSON EDGE, et al., Plaintiffs,	)	[Filed December 1, 1981]
v.	)	CIVIL ACTION NO. 80-20-AMER
SUMTER COUNTY SCHOOL DISTRICT, et al., Defendants.	)	

OPINION AND ORDER

This is an action by black residents of Sumter County, Georgia, by which they seek declaratory and injunctive relief so as to abolish the at-large method of election of members of the Board of the Sumter County School District and the adoption or imposition of a new plan of fairly-apportioned districts for the election of Board members. The Plaintiffs base their claim for relief on the failure of the

District to obtain preclearance pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c for the 1973 change to at-large elections.

The Plaintiffs have filed a motion for summary judgment on the issue of Section 5 preclearance. The Defendants contend that the change to the at-large method was court-ordered and therefore not subject to Section 5 preclearance.

There is no controversy concerning the basic facts. Pursuant to Georgia Laws 1968, p. 2065, the Sumter County Board of Education consisted of seven members elected from four single-member districts, one two-member district, and with one member elected at-large. On July 12, 1972 these election districts were declared unconstitutionall

apportioned in Carter v. Crenshaw, C.A. No. 768 (M.D. Ga., Americus Division). The District Court offered the Board an opportunity to devise a new election system. This led to a legislative enactment by the General Assembly of Georgia some six months later of a statute identified as Georgia Laws 1973, p. 2127, which provided for at-large elections for the entire Board. This legislative change was submitted to the Attorney General for clearance pursuant to Section 5 of the Voting Rights Act of 1965. On July 13, 1973 the Attorney General interposed an objection to the change. In spite of this objection the at-large system has been utilized for Board elections up to the present time.

The question presented for this Court's decision is whether the 1973 change

to an at-large method of election is subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965.

It is clear, and the Defendants do not dispute, that the at-large system provided for by the 1973 legislative enactment above referred to differs from the mixed district and at-large system which had been in use since 1968. What the Defendants contend is that the change brought about by the 1973 enactment was ordered by the Court in Carter v. Crenshaw, supra, and that such a court-ordered plan is not subject to Section 5.

A reading of the Court's opinion and order in Carter v. Crenshaw, supra, demonstrates that what the Court did in that case was decide that the election districts

as they then existed were unconstitutionally apportioned but then offered the Defendants in that case an opportunity to devise a new election system which would comport with legal requirements. The Court did not direct that any particular system be adopted. It is true that the later action of the elected representatives of the people, by which the at-large system now under attack was adopted, was doubtless the result of the Court's 1972 order in Carter v. Crenshaw, supra, but this was not the action of the Court nor was it directed by the Court.

In the recent case of McDaniel v. Sanchez, _____ U.S. _____, 68 L.Ed.2d 724 (1981), the United States Supreme Court stated:

> "As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting

> the policy choices of the elected representatives of the people -- no matter what constraints have limited the choices available to them -- the preclearance requirement of the Voting Rights Act is applicable."
>
> p. 741.

There can be no doubt that the change to an at-large election system which we are here considering, resulting as it did from an Act of the Georgia Legislature, reflected the "policy choices of the elected representatives of the people", and, in light of the Supreme Court decision in McDaniel v. Sanchez, supra, we are led to conclude that it is clear that the adoption of the at-large system is subject to the preclearance requirements of Section 5 and that the elections held under the at-large system in spite of the Attorney General's objections

violated Section 5.

As Section 5 by its terms renders unprecleared changes legally unenforceable, the ordinary course for this three-judge court would be to simply enjoin elections under the unprecleared system thereby returning the school district to its last legally enforceable election system, which in this case would be the mixed system provided for in Georgia Laws 1968, p. 2065. However, in the circumstances here presented, the presently existing districts were declared unconstitutionally apportioned in Carter v. Crenshaw, supra, and there is now no legally enforceable election system for the school district. The jurisdiction of a three-judge Section 5 Court is limited to a determination of Section 5 coverage and thus this Court lacks authority as a Section 5 Court to remedy the malapportionment of the old districts. It is thus appropriate

that this three-judge Court, having determined the Section 5 issue, remand the case to a single judge Court to address the violations which have occurred and to supervise the development by the local authorities of a legally enforceable election plan, which plan will, of course, be subject to the preclearance requirements of Section 5.

We conclude that the undisputed facts of this case entitle the Plaintiffs to summary judgment as a matter of law on their claim that the at-large election system used by the Sumter County School District is violative of Section 5 of the Voting Rights Act of 1965. It is, therefore, ordered that the Plaintiffs' motion for summary judgment should be and the same is hereby sustained and that the Defendants, their

agents and employees, and all others acting in concert with them, be and they are hereby enjoined and restrained from further use of the at-large plan for electing members of the Board of the Sumter County School District as contained in Georgia Laws 1973, p. 2127, and it is further ordered that this case is remanded to the single member District Court for the supervision of the development and implementation of a new election plan which satisfies legal requirements.

SO ORDERED this 25th day of November, 1981.

s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

s/ Wilbur D. Owens, Jr.
UNITED STATES DISTRICT JUDGE

s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

JUDSON EDGE, et al.,	)	[Filed January 5, 1982]
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 80-20-AMER
SUMTER COUNTY SCHOOL DISTRICT, et al.,	)	
	)	
Defendants.	)	

ORDER

By order dated November 25, 1981 and filed December 1, 1981, the Court sustained the Plaintiffs' motion for summary judgment in the case above identified. The Defendants have now filed a motion pursuant to Rule 59 of the Federal Rules of Civil Procedure suggesting that the Court set aside the Court's order above referred to. A brief was filed in support of the motion and the Plaintiffs have filed a response.

Upon consideration, the Court determines that the Defendants' motion to set aside the Court's previous order should be and the same is hereby denied.

IT IS ORDERED this 4th day of January, 1982.

s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

s/ Wilbur D. Owens, Jr.
UNITED STATES DISTRICT JUDGE

s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

JIMMY CARTER, et al.,	)	[Filed July 12, 1972]
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 768
HUGH CRENSHAW, JAMES GASTON, E.L. POOLE, ROLAND SATTERFIELD, individually and in their official capacities as members of the SUMTER COUNTY BOARD OF EDUCATION, et al.,	)	
	)	
Defendants.	)	

O P I N I O N

This civil action in three counts was brought by a group of citizens and taxpayers in Sumter County, Georgia against four members of the Sumter County Board of Education ("the Board") and certain county officials having responsibilities for the conduct of elections.

Count One seeks a declaratory judgment that the elections of members of the Board in 1968 and 1970 were "unlawful and void" in that the 1968 Georgia Act which authorized such elections was not approved as allegedly required by the provisions of the federal Voting Rights Act of 1965. In Count Two it is contended that the 1968 Georgia Act violates the "one man - one vote" rule as enunciated in federal court decisions cited, and in Count Three the Plaintiffs complain of certain acts and conduct of the four named members of the Board which are alleged to be an abuse of their official position.

A three-judge District Court was convened to hear and determine the matters alleged in the complaint. Following a hearing, the three-judge Court issued an order retaining jurisdiction for decision

with respect to Count One, but dissolving the three-judge Court as to Count Two and County Three and remitting these counts to the undersigned single judge for disposition.

As to Count Three, it was also ruled by the three-judge Court that the issues there sought to be raised are either matters which should be considered by the District Court for the Northern District of Georgia, which Court entered the desegregation order applying to the Sumter County system, or are matters which are already being litigated in other actions in the Americus Division of the District Court of the Middle District of Georgia. It thus appears that there is no present need for a hearing in this action with respect to Count Three.

Count Two duly came on for an

evidentiary hearing before the Court. The essential facts were not in controversy, being established either by admissions in the Defendants' answer or by stipulation of the parties. It was acknowledged by the Defendants that the education districts created by the 1968 Georgia Act do not now satisfy the requirements of the "one man - one vote" cases and are thus illegally constituted; and at the hearing counsel for the parties were in disagreement only with respect to the question of relief.

In their complaint the Plaintiffs prayed that the Court declare that the offices of all members of the Board are vacant and that a special election be held to fill the unexpired terms on an at-large basis. This position was modified somewhat at the hearing, at which time plaintiffs' counsel urged that the terms of the three Board members which will expire on January 1, 1975 be

shortened to January 1, 1973, and that all seven posts be filled in the 1972 primary and general elections on an at-large basis. The Court has concluded that any such relief is inappropriate and unjustified under all the facts and circumstances of this case and should be denied, and instead that the relief proposed by the Defendants, as discussed below, should be granted.

FINDINGS OF FACT

Substantially all of the Plaintiffs are citizens and taxpayers of that portion of Sumter County, Georgia lying outside of the City of Americus[1] and are qualified to vote in the 1972 primary and general elections for members of the Board. Some of them are parents of school age children enrolled

[1]The City of Americus has a separate public school system.

in the public schools of Sumter County under the jurisdiction of the Board.

Prior to 1968, the members of the Board were appointed by the Grand Jury pursuant to the Georgia Constitution. The 1968 Georgia Act which is here attacked, Ga. Laws 1968, p. 2065, et. seq., provided that the Board would be composed of seven members to be elected from education districts, and that the members would serve staggered four year terms. There are seven numbered posts. Posts one and two are occupied by Board members from Education District No. 1; posts three, four, five and six are occupied by Board members from Education Districts Nos. 2, 3, 4 and 5, respectively; and post seven is occupied by a Board member elected on an at-large basis. The four named Defendants, to-wit: Roland Satterfield, Hugh Crenshaw, E.L. Poole and

James Gaston,[2] occupy posts one, three, five and six, respectively. Posts four and seven are occupied by two of the Plaintiffs, O.A. Williams, who is Chairman of the Board, and Dr. T. Schley Gatewood, respectively. Post two is currently vacant.

The terms of the holders of posts one, five and six continue until January 1, 1975. The terms of the holders of posts two, three, four and seven, expire on January 1, 1973, and their successors will be nominated in the primary to be held on August 8, 1972, and elected in the general election in November, 1972.

According to the 1970 census, the population data for each of the education

---

[2]Although the caption and paragraph 2 of the complaint name only these four Board members, individually and officially as Board members, as Defendants, the Plaintiffs actually seek relief against the entire Board, as appears elsewhere in the opinion.

districts, and the percentages and deviations from average with respect to each post, are as follows:

Education District	Post	Population 1970 Census	% of Population	Deviation from Average (1807)
1	1 & 2	2,468	11.4 (per post)	- .68
2	3	2,506	23.1	+ 1.33
3	4	1,499	13.8	+ .83
4	5	2,035	18.8	+ 1.13
5	6	2,332	21.5	+ 1.28
	Total	10,840		

There have been no substantial shifts in population in Sumter County 1968 and the present date.

The racial mix of the population by election posts is as follows:

	WHITE	NON-WHITE	TOTAL
Posts 1 & 2	1,766	702	2,468
Post 3	1,215	1,291	2,506

(continued on next page)

	WHITE	NON-WHITE	TOTAL
Post 4	871	628	1,499
Post 5	909	1,126	2,035
Post 6	1,158	1,174	2,332
County Total	5,919	4,921	10,840

These figures indicate that no racial discrimination has resulted from the population disparities and instead that the contrary is true. Although the population of that part of Sumter County lying outside of the City of Americus is approximately 55% white and 45% black, blacks comprise a present majority in posts three, five and six. Assuming that registrations were proportionate to population and that all persons voted according to race, black citizens should be able to elect three out of seven Board members, which would be almost the exact ratio of black citizens to the population

at large. On the other hand, if all seven Board members were elected on an at-large basis as proposed by Plaintiffs, black citizens could elect no Board members if the same assumptions prevailed.

It was stipulated that none of the 44 Plaintiffs, and so far as they know no other persons, complained to the Board about the apportionment of the education districts at any time before this suit was filed on April 11, 1972. During the period of about four years intervening between the passage of the 1968 Act and the commencement of this action, all of the present members of the Board were elected or were appointed to fill vacancies without complaint or objection.

At its 1972 session, the General Assembly of Georgia approved a proposed Constitutional amendment authorizing the

merger of the school systems of the City of Americus and Sumter County into one county-wide system to be known as the "Sumter County School System". Ga. Laws, 1972, p. _____. (H.R. 609-1425). This Constitutional amendment will be submitted to the voters of Sumter County in the general election of 1972.

The General Assembly also adopted in 1972 a spearate act which would become effective if the proposed Constitutional amendment is approved. Ga. Laws, 1972, p. 2519, et. seq. This act provides that the consolidated system would be governed by a Board of Education consisting of ten members to be appointed by the City and the County, plus the Mayor of the City of Americus and the Chairman of the Couty Board of Commissioners serving as nonvoting, ex-officio members. There would be no voting

districts or education posts. If approved, the consolidation proposal would become effective on January 1, 1973, and in that event the parts of the 1968 Georgia Act attacked in Count Two would be of no force and effect thereafter.

CONCLUSIONS OF LAW

1.

It is acknowledged by the Defendants that: (a) the Sumter County Board of Education is a unit of local government having "general governmental powers"; (b) the population disparities between the different education districts is sufficiently great to violate the "one man - one vote" rule enunciated in various federal cases, and may be classified as arbitrary and invidious; and (c) the Board is thus legally constituted. Avery v. Midland County, 390 U.S. 474, 88 S. Ct. 1114 (1968); Hadley v. Junior College District, 397 U.S. 50, 90 S. Ct. 791

(1970); and Grimes v. Clark, 226 Ga. 195 (1970).

2.

Under all the facts and circumstances of this case, including the intervening elections of 1968 and 1970 about which no objection was voiced and the absence of any complaint to the Board itself for a period of some four years between the passage of the 1968 Georgia Act and the filing of the present action, and in view of the availability of other possible solutions, as discussed below, the Court holds that it would be inappropriate, inequitable, and contrary to the best interests of all of the citizens of Sumter County if the Court should grant the drastic relief sought by the Plaintiffs. The Court prefers the course of action hereafter prescribed, "to an assumption of powers by the Court not judicial in nature", as stated

in Grimes v. Clark, supra.

3.

It is the conclusion of the Court that only prospective relief would be appropriate in this case and that the granting of such relief should be deferred temporarily so as to afford a full opportunity for the illegally constituted education districts to be abolished or corrected in either of the following ways:

(a) If the voters of Sumter County, including those residing in the City of Americus, should approve the proposal to merge the City and County school systems in the general elections of 1972, the education districts here complained of would be abolished as of January 1, 1973, and the controversy would become entirely moot. The Court neither has nor expresses any opinion as to the probable outcome of the referendum. What is

significant is that less than four months remains before the date of the referendum and if the outcome is favorable to consolidation, the very sort of relief prayed for by the Plaintiffs, i.e. service on the Board on an at-large basis, would become a reality within less than six months. The Court prefers to allow the voters to decide the question of consolidation free of any judicial interference with the normal functioning of the school system;

(b) If the consolidation proposal is defeated, the Court believes that the General Assembly of Georgia, including particularly those persons who are elected to represent Sumter County in the Senate and the House of Representatives, should have the opportunity at the 1973 session to take corrective action. This opinion represents the first notice of the need for such action. The Court

presumes that the General Assembly will take full cognizance of this holding and will do whatever is necessary, if action should be required by it, to eliminate the problem. This might be done in a variety of ways, such as, for example, (1) by redefining the education districts so as to bring any population disparities within limits acceptable under applicable federal Court decisions, or (2) by providing for the election of members of the Board on an at-large basis. The General Assembly might take direct action, or, in the alternative, may see fit to submit the question to the voters at another referendum, as was done following the passage of the 1968 Georgia Act. The local candidates for the General Assembly will have the opportunity while campaigning to ascertain the wishes of the voters respecting these and other possible legislative solutions. Terms of the incumbent

members of the Board could be shortened so as to cause the corrective action to become effective without any appreciable delay. It is reasonable to conclude that whatever action might be taken by the General Assembly in the exercise of its legislative judgment should become effective, and thereby make this controversy a moot one, by July 1, 1973, at the very latest.

4.

To insure continuity of school programs and the authority of all school officials during the coming school year, the Court directs that the present Board shall be constituted as a de facto Board until removed or ejected by the further order of this Court. Any new members of the Board who are elected or appointed to fill vacancies during the continuance of the interim arrangement herein provided for shall likewise serve as de facto Board members until removed or

ejected. The acts of the Board, as thus constituted now and from time to time hereafter, shall be as valid and binding in all respects as would be the acts of a de jure Board.

5.

This is an interim order only. The Court retains jurisdiction of Count Two for all purposes. If the consolidation proposal is defeated in the forthcoming referendum, and if the General Assembly fails to take such action at its 1973 session as will eliminate or validly modify the malapportioned education districts with any such action to be effective no later than July 1, 1973, the Court will, upon motion of the Plaintiffs, order whatever is necessary at that time in the Court's judgment to afford full relief. See, Toombs v. Fortson, 275 F. Supp. 128, 134 (N.D. Ga. 1966).

It is directed that counsel for the Defendants prepare and submit an appropriate order to the Court in accordance with the foregoing findings of fact and conclusions of law.

IT IS SO ORDERED this the 12th day of July, 1972.

s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

JIMMY CARTER, ET AL.,	:	[Filed July 12, 1972]
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION
	:	NO. 768
HUGH CRENSHAW, JAMES GASTON, E.L. POOLE, ROLAND SATTERFIELD, individually and in their official capacities as members of the SUMTER COUNTY BOARD OF EDUCATION, et al.,	:	
	:	
Defendants.	:	

INTERIM ORDER

Count Two having duly come on for a hearing before the Court on the plaintiffs' prayers for a declaratory judgment and a preliminary injunction; and the Court having rendered an opinion dated July 12, 1972 containing Findings of Fact and Conclusions of Law, which are incorporated herein by reference;

NOW THEREFORE, IT IS CONSIDERED, ORDERED AND ADJUDGED:

1. The Sumter County Board of Education ("the Board") is now illegally constituted becuase the population disparities between the different education districts are sufficiently great to violate the "one man-one vote" rule enunciated in various Federal cases.

2. To insure continuity of school programs and the authority of all school officials pending further order of this Court, the Board is constituted as a de facto board, with any new members of the Board who are hereafter elected or appointed to fill vacancies during the continuance of this interim arrangement likewise to serve as de facto board members. The acts of the Board, as thus constituted now and from time to time hereafter, shall be as valid and

binding in all respects as would be the acts of a de jure board.

3. The Court temporarily defers the granting of further relief so as to afford a full opportunity for the education districts to be abolished or corrected in either of the ways outlined in Conclusion of Law No. 3 in the Court's opinion dated July 12, 1972.

4. If the malapportioned education districts are not eliminated or validly modified no later than July 1, 1973, the Court will, upon motion of the plaintiffs, order whatever is necessary at that time in the Court's judgment to afford full relief.

5. This is an interim order only, and the Court retains jurisdiction for all purposes.

SO ORDERED, this the 28th day of July, 1972.

s/ J. Robert Elliott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
AMERICUS DIVISION

JUDSON EDGE, et al.,	)	[Filed February 3, 1982]
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	No. 80-20-AMER
SUMTER COUNTY SCHOOL DISTRICT, et al.,	)	
	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Sumter County School District, the Sumter County Board of Education, Jack Deriso, Marvin McNeill, Ed Hutchinson, E.J. Satterfield, J.N. Cook, Martha Wise, and Dan Parker, defendants herein, hereby appeal to the Supreme Court of the United States from the order entered in this action on January 5, 1982, denying the defendants'

motion to set aside the Court's previous order sustaining the plaintiffs' motion for summary judgment.

This appeal is taken pursuant to 28 U.S.C. § 1253.

s/ W. Warren Plowden, Jr.
W. WARREN PLOWDEN, JR.

s/ Frank L. Butler, III
FRANK L. BUTLER, III

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Attorneys for Appellants

42 U.S.C. § 1973.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on November 1, 1968, or whenever a state or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,

or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such

objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section

2284 of Title 28 and any appeal shall lie to the Supreme Court.

Ga. L. 1973, p. 2127 et seq.

"Section 1. (a) The Board of Education of the Sumter County School System shall be composed of seven members to be elected as hereinafter provided.

(b) For the purposes of electing the members of said Board of Education, there shall be seven Education Districts as follows:

Education Districts 1 and 2 shall each be composed of that territory within Sumter County embraced within that portion of the 27th voting precinct which lies outside the City of Americus.

Education District No. 4 shall be composed of that territory within Sumter County which lies within the 15th (Leslie)

voting precinct.

Education District No. 5 shall be composed of that territory within Sumter County which lies within the old 26th (Plains) voting precinct.

Education District No. 6 shall be composed of that territory within Sumter County which lies within the old 16th (Huntington) voting precinct, the 28th (Chambliss) voting precinct and the 29th (Andersonville) voting precinct.

Education District No. 7 shall be composed of that territory within Sumter County which lies within the new 16th (Sumter) voting precinct, the 17th (Thompson) voting precinct and the new 26th (Concord) voting precinct.

Section 2. (a) One member of said Board of Education shall be elected from each Education District. Each candidate for membership on said Board shall designate the

Education District for which he is offering. No person shall be eligible for membership on said Board of Education unless he is at least 25 years of age and has been a resident of Sumter County for at least two years and a resident of his respective Education District for at least one year immediately preceding the date of his election.

(b) Each member of said Board of Education shall be elected by a majority vote of the qualified voters voting in the Sumter County School District. All members of said Board of Education shall be nominated and elected in accordance with the provisions of Code Title 34, known as the 'Georgia Election Code', as now or hereafter amended.

(c) In the event a vacancy occurs on said Board of Education for any reason, other than the expiration of the term of office, the remaining members shall appoint a resident

of the Education District wherein the vacancy occurred to serve for the unexpired term, and the member so appointed shall possess the same qualifications as provided herein for elected members. In the event no candidate offers for an Education District, the grand jury shall appoint a member to serve until the next election, and the member so appointed shall possess the same qualifications as provided herein for elected members. In the event a member of said Board of Education changes his residence from the Education District from which he was elected, a vacancy shall exist from such District and shall be filled in the same manner as other vacancies.

(d) Each member of the Board of Education shall receive $600.00 per annum, payable in equal monthly installments from county funds, as full compensation for their duties.

Section 3. (a) The member of the heretofore existing Board of Education of the Sumter County School System from former Post seven who was elected by the voters of the Sumter County School District at-large at the general election of 1972, for a term beginning January 1, 1973, and ending December 31, 1976, shall continue to serve for the remainder of the term to which elected, and such member shall be deemed to be the member from Education District 1 created herein.

(b) The first members of the Board of Education created herein elected from Education Districts 2,4 and 5 shall be elected at a special election to be held on June 5, 1973, and shall take office on July 1, 1973, for terms to end on December 31, 1976. At the general election held in 1976, successors to the initial members from Education Districts 1, 2, 4 and 5 shall be

elected for terms of four years beginning on January 1, 1977, and until their successors are elected and qualified. The first members of the Board of Education created herein elected from Education Districts 3,6 and 7 shall be elected at said special election to be held on June 5, 1973, and shall take office on July 1, 1973, for terms to end on December 31, 1974. At the general election held in 1974, successors to the initial members from Education Districts 3, 6 and 7 shall be elected for terms of four years beginning on January 1, 1975, and until their successors are elected and qualified. Thereafter, all members shall be elected at the general election immediately preceding the expiration of their respective terms of office and shall take office on the first day of January immediately following their election for terms of four years and until their successors are elected and qualified.

Section 4. At the first meeting of

of the Board of Education conducted in July, 1973, the Board shall elect a chairman from its own membership to serve until his successor is elected as provided herein. Beginning with the first regular meeting of the Board held in January, 1974, and at the first regular meeting held in January of each year thereafter, the Board shall elect a chairman from its own membership. Four members of the Board shall constitute a quorum for the transaction of any business which may come before the Board."

Motion to Dismiss or Affirm

81-1856

Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-8156

IN THE

Supreme Court of the United States

October Term, 1981

SUMTER COUNTY SCHOOL DISTRICT, ET AL.,
Appellants,

vs.

JUDSON EDGE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of this appeal pursuant to 28 U.S.C. §1253 where the order appealed from is not one granting or denying an interlocutory or permanent injunction?

2. Whether the Court has jurisdiction of this appeal pursuant to 42 U.S.C. §1973c despite Appellants' failure to file a timely notice of appeal under the statute, or one in conformity with the Rules of this Court?

3. Whether a change from district to at-large elections in 1973 for the Sumter County, Georgia Board of Education may be implemented despite an objection to the change interposed by the Attorney General pursuant to §5 of the Voting Rights Act of 1965, and the failure of Appellants to secure a favorable declaratory judgment from the district court for the District of Columbia?

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MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16, move that this appeal be dismissed on the grounds that it is not within this Court's jurisdiction and not taken in conformity with statute or the Rules of this Court, or in the alternative, to affirm the judgment of the district court on the grounds that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

Appellees are black and white citizens of Sumter County, Georgia. They filed their complaint on April 25, 1980 to enforce an objection by the Attorney General pursuant to §5 of the Voting Rights Act of 1965 to a change in the method of electing the Board of Education from districts to at-large.

Pursuant to Georgia Laws 1968, p. 2065, the Board of Education had been composed of seven members elected by majority vote

to staggered, four-year terms from five education districts. Two members were elected from one district, one member elected from each of the four remaining districts, and one member elected at-large.

On July 12, 1972, the federal district court ruled in Carter v. Crenshaw, Civ. No. 768 (M.D.Ga.) that the education districts were malapportioned, and entered an interim order allowing Appellants an opportunity to seek a legislative remedy. The Georgia General Assembly subsequently enacted legislation abolishing the district system and requiring all members of the Board of Education to be elected at-large.[1]

On May 10, 1973, the Appellants submitted the at-large change to the Department of Justice for pre-clearance under §5. The

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1. Ga. Laws 1973, p. 2127. Terms of office are for four years and are staggered. Candidates are required to designate and reside in one of seven education districts for which they are offering, while election is by majority vote.

Attorney General by letter of July 13, 1973 objected to the submission on the grounds that "we are unable to conclude, as we must under the Voting Rights Act, that the use of the at-large election system you have submitted will not have a racially discriminatory effect."[2]

On July 24, 1973, the Board of Education informed the Department of Justice that it considered its submission a "useless and unlawful act" and the objection "illegal, void and of no effect." The Board reasoned that the at-large system, although it had been adopted by the legislature, resulted from a district court order and was thus exempt

---

2. The Attorney General noted that his "investigation reflected there are significant concentrations of black citizens in parts of Sumter County and that the requirement that all candidates must be voted on countywide would result in the dilution and minimization of the voting strength of black citizens." Under the prior district plan, according to the 1970 census, three of the five education districts were majority black.

from pre-clearance under §5. The Department of Justice responded on September 12, 1973 that the legislative plan was "properly subject to the pre-clearance requirements of Section 5 of the Voting Rights Act" and that the change to at-large elections was "inoperable in view of the objection."

In spite of the §5 objection, and without seeking a declaratory judgment from the federal district court for the District of Columbia that the change had neither the purpose nor effect of denying or abridging the right to vote on account of race or color, Appellants refused compliance and continued to hold elections under the 1973 law at-large.

On December 1, 1981, the three-judge district court concluded that "the undisputed facts of this case entitle the Plaintiffs to summary judgment as a matter of law on their claim that the at-large system used by the Sumter County School

District is violative of Section 5 of the Voting Rights Act of 1965." JS 8a.[3] The Appellants filed a motion pursuant to Rule 59, F.R.Civ.P., to set aside the December 1, 1981 order, which motion was denied by the three-judge court on January 5, 1982. JS 10a.

The Appellants filed a notice of appeal to this Court on February 3, 1982. JS 35a. The notice specified that the appeal was limited to the order of "January 5, 1982, denying the motion to set aside the Court's previous order sustaining the plaintiffs' motion for summary judgment," JS 35-6a, and that the jurisdiction of the Court to hear the case was predicated exclusively on 28 U.S.C. §1253.

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3. "JS" refers to the Jurisdictional Statement.

ARGUMENT

I.

THE COURT LACKS JURISDICTION OF THIS APPEAL PURSUANT TO 28 U.S.C. §1253 BECAUSE APPELLANTS DO NOT APPEAL FROM ANY ORDER GRANTING OR DENYING AN INTERLOCUTORY OR PERMANENT INJUNCTION.

Twenty-eight U.S.C. §1253, the statute pursuant to which this appeal was taken, vests this Court with appellate jurisdiction from an order granting or denying an interlocutory or permanent injunction in any civil action required by Act of Congress to be heard and determined by a district court of three judges.[4] The order appealed from in this case is not one granting or denying injunctive relief, but rather an order denying a motion to set aside a previous

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4. Section 1253 provides in its entirety: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, any interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

order of the three-judge court granting summary judgment to Appellees. The order appealed from is thus not within the statutory definition of appealable, injunctive orders contained in §1253, with the consequence that the Court lacks jurisdiction over the appeal pursuant to the statute.

This Court has stressed that §1253 is not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." Phillips v. United States, 312 U.S. 246, 251 (1941). Accordingly, the Court has held that an order granting or denying only a declaratory judgment may not be appealed under §1253, Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970), Mitchell v. Donovan, 398 U.S. 427, 430-31 (1970), Gerstein v. Coe, 417 U.S. 279 (1974); an interlocutory order denying summary judgment to a plaintiff who has

requested injunctive relief is not appealable under §1253, Goldstein v. Cox, 396 U.S. 471, 479 (1970); a direct appeal will lie under §1253 only where the order denying interlocutory or permanent injunctive relief rests upon resolution of the merits of the constitutional claim presented below, MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), McCarthy v. Briscoe, 429 U.S. 1316 (1976); and, direct appeal is available under §1253 only if the case meets the requirements for convening a three-judge court. Perez v. Ledesma, 401 U.S. 82, 86-7 (1971); Lynch v. Household Finance Corp., 405 U.S. 538, 541 n.5 (1972); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 101 (1974).

This appeal, taken under §1253, is not from an order granting or denying an injunction.[5] Given this Court's requirement

5. Appellants apparently concede the point, for they abandon all reliance upon §1253 in their jurisdictional statement, relying instead upon 42 U.S.C. §1973c as the jurisdictional basis for this appeal. JS 3. (Footnote continued on next page)

of strict construction of the statute, the appeal should be dismissed.

II.

THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANTS FAILED TO FILE A TIMELY NOTICE OF APPEAL OR ONE IN CONFORMITY WITH THE RULES OF THIS COURT.

The notice of appeal in this case specified only that the appeal was taken under 28 U.S.C. §1253. JS 36a. In their Jurisdictional Statement, however, Appellants argue that their appeal lies to this Court under 42 U.S.C. §1973c. But Appellants having failed to file a notice of appeal pursuant to §1973c, this appeal must be deemed defective and dismissed on jurisdictional grounds. Gabriel v. United States, 429 U.S. 877 (1976); Charger Investments, Inc. v. Corbett, 429

(Footnote continued from preceding page) However, as appears more fully infra, Appellants did not specify in their notice of appeal that the appeal was taken pursuant to the latter statute and should be foreclosed from relying upon it now.

U.S. 877 (1976).[6]

This appeal should be dismissed for the separate and additional reasons that the notice of appeal is not in conformity with the Rules of this Court. Rule 10.2 requires an Appellant to specify the statute or statutes under which an appeal is taken.[7] Rule 16.1(a) authorizes dismissal of an appeal when not taken in conformity with

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6. In conformity with Rule 11 and 28 U.S.C. §2101(b), an appeal pursuant to §1973c "shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final." Because the three-judge court remanded for development and implementation of a new election plan, its December 1, 1981 order was interlocutory. Any notice of appeal in this case specifying §1973c, taking into account the pendency and denial of the motion to set aside on January 5, 1982, Communist Party v. Whitcomb, 414 U.S. 441 (1974), should have been filed no later than February 4, 1982.

7. Rule 10.2 provides in relevant part: "The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, giving the date of its entry, and shall specify the statute or statutes under which the appeal to this Court is taken."

the Rules of this Court.[8] See Pittsburg Tow. Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966). Since Appellants failed to specify in their notice of appeal that this appeal was taken pursuant to §1973c as required by Rule 10, this appeal should be dismissed as not being in conformity with the Rules of this Court.

III.

THE THREE-JUDGE COURT WAS PLAINLY CORRECT IN ENFORCING A §5 OBJECTION BY THE ATTORNEY GENERAL TO A 1973 CHANGE FROM DISTRICT TO AT-LARGE ELECTIONS FOR THE SUMTER COUNTY, GEORGIA, BOARD OF EDUCATION, AND IN VIEW OF APPELLANTS' FAILURE TO RECEIVE PRE-CLEARANCE FROM THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

The lower court held in its order of December 1, 1981 that the Sumter County Board of Education was a covered jurisdiction for purposes of §5, the 1973 implementation of at-large voting was a change subject to pre-clearance, and the Attorney General had objected to implementation of

8. Rule 16.1(a) provides: "The Court will receive a motion to dismiss an appeal on the grounds that the appeal is not within this Court's jurisdiction, or because not taken in conformity with statute or with these Rules."

the change. Under the circumstances, and in view of the fact that Appellants had not secured pre-clearance from the district court for the District of Columbia, the court properly enforced the §5 objection by enjoining further use of the change. Allen v. State Board of Elections, 393 U.S. 544, 572 (1969); Perkins v. Matthews, 400 U.S. 379, 397 (1971); Georgia v. United States, 411 U.S. 526, 541 (1973); Dougherty County v. White, 439 U.S. 32, 36 (1978); Canady v. Lumberton City Board of Education, ___ U.S. _____, 102 S.Ct. 494 (1981).[9]

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9. As noted supra, Appellants appealed only the order entered on January 5, 1982 denying a motion to set aside. JS 35-6a. This Court has on occasion considered the underlying merits of appeals in cases where notices of appeal were limited in terms to orders denying motions for new trial. United States v. Ellicott, 223 U.S. 524, 538-39 (1912); State Farm Mutual Auto Insurance Co. v. Palmer, 350 U.S. 944 (1956). Appellees contend, however, that in a §5 case where Congress has made the decision to "shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims," South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), and (Footnote continued on next page)

The issue of retroactive application of McDaniel v. Sanchez, ___U.S.___, 101 S.Ct. 2224 (1981), raised by Appellants is entirely a red herring. The Attorney General informed Appellants on September 12, 1973 that their at-large plan was required to be pre-cleared. McDaniel v. Sanchez, supra, decided eight years later, showed merely that the Attorney General was correct in his determination that the 1973 act was a legislative

(Footnote continued from preceding page) to short circuit the "dragging out" of §5 compliance, Morris v. Gressette, 432 U.S. 491, 504 (1977), and where pre-clearance has in fact been denied, the failure to specify in the notice of appeal the order sought to be reviewed should not be regarded as harmless error. See Rule 10.2. Accordingly, the appeal should be limited to the issue raised in the notice of appeal--whether the lower court erred in denying the motion under Rule 59, F.R.Civ.P. As to this issue, the proper standard of review is whether the denial was an abuse of discretion, Allied Chemical Corp. v. Daiflon, Inc., ___U.S.___, 101 S.Ct. 188 (1980), a showing that Appellants cannot possibly make upon the facts of this case.

plan.[10] There is nothing in McDaniel that alters in any way the Attorney General's objection.[11] There is, quite simply, no issue whatsoever of retroactive application

10. This Court held in McDaniel v. Sanchez, supra, 101 S.Ct. at 2238:

> Whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people--no matter what constraints have limited the choices available to them--the pre-clearance requirement of the Voting Rights Act is applicable.

There is no question that the 1973 enactment at issue reflects the policy choices of state officials and is a legislative plan subject to §5 pre-clearance and the three-judge court properly so held.

11. Even if McDaniel was new doctrine--which it was not, see Wise v. Lipscomb, 437 U.S. 535, 542 (1978)--a district court is obligated "to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). There is nothing in §5, the legislative history of the Voting Rights Act of 1965, or McDaniel which suggests the decision is inapplicable to pending cases. Moreover, not to apply McDaniel to the egregious facts of this case, i.e., nine years of flouting the Voting Rights Act, would be unconscionable.

of McDaniel involved in this case.[12]

The fact that Appellants disagreed with the Attorney General's decision in 1973 is irrelevant. The law is abundantly clear that determinations by the Attorney General under §5 are final and are not subject to review. Morris v. Gressette, 432 U.S. 491, 505 n.21, 507 (1977). Compare Briscoe v. Bell, 432 U.S. 404 (1977). The only method of setting aside a §5 objection by the Attorney General is by the alternate route of pre-clearance in the district court for the District of Columbia, a route Appellants chose not to follow. To allow Appellants disagreement with the Attorney General to deprive his objection of finality or effect would be tantamount to repeal of §5.

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12. Another non-issue raised by Appellants is application of McDaniel to unsubmitted pre-1981 reapportionment plans adopted at the direction of federal courts. JS 22. This case involves wholly different facts so that the resolution of any such issue would be purely advisory.

The only issue of retroactivity in this case is one of relief, i.e., whether Appellees are entitled to special elections as well as a prohibition against future use of at-large voting. See, e.g., Berry v. Doles, 438 U.S. 190 (1978). Whatever the answer to that question, however,[13] there is no doubt that the change involved here cannot be implemented for future elections absent pre-clearance. Allen v. State Board of Elections, supra; Perkins v. Matthews, supra; Berry v. Doles, supra, 438 U.S. at 195 n.1 (concurring opinion of J. Brennan) ("the duty to comply with §5 is a continuing one."); Canady v. Lumberton City Board of Education, supra.

If the Court takes jurisdiction over this appeal, it should affirm.

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13. This issue has not yet been addressed by the district court and is not before the Court.

CONCLUSION

Wherefore, Appellees respectfully submit that this appeal should be dismissed on the grounds that it is not within the Court's jurisdiction or not taken in conformity with statute or the Rules of this Court, or in the alternative, that the questions upon which this cause depends are so unsubstantial as not to need further argument and that the opinion and judgment of the three-judge district court be affirmed.

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Appellant's Reply Brief

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No. 81-8156

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SUMTER COUNTY SCHOOL DISTRICT, et al.,

Appellants,

v.

JUDSON EDGE, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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No. 81-8156

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants oppose the Motion to Dismiss or Affirm filed by appellees

and make this brief response to the arguments set forth by appellees in support of said motion:

I.

Appellees argue that this Court lacks jurisdiction of this appeal pursuant to 28 U.S.C. § 1253 "because appellants do not appeal from any order granting or denying an interlocutory or permanent injunction." (M 6).[1] This argument is without merit.

It is true that 28 U.S.C. § 1253 by its terms limits appeals to orders from three-judge courts granting or denying an interlocutory or permanent injunction. The order

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[1] "M" refers to the Motion to Dismiss or Affirm.

of the district court in this case specifically provides that the appellants "be and they are hereby enjoined and restrained from further use of the at-large plan for electing members of the Board of the Sumter County School District . . . " (JS 9a).[2] In Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972), this Court held that the order of a three-judge court enjoining state and county officers "from holding or conducting any future elections under the present Apportionment Statutes" was "sufficient to

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[2] "JS" refers to the Jurisdictional Statement.

justify a direct appeal under § 1253." Id. at 194-95.

This case was brought by the appellees seeking declaratory and injunctive relief (JS 1a), and the three-judge court's order grants both forms of relief. This Court has held that where parties appeal from the entry of an injunction, they are entitled to have this Court review any accompanying declaratory judgment "in the interest of judicial economy and the avoidance of piecemeal litigation." White v. Regester, 412 U.S. 755, 761 (1973). This is especially true where "the arguments as to both aspects are necessarily identical." Roe v. Wade, 410 U.S. 113, 123 (1973). Since the order which is the subject of the

appeal in the instant case (discussed infra) contains both injunctive and declaratory aspects, the appeal is properly before this Court under 28 U.S.C. § 1253.

This Court has also held that it has jurisdiction from a summary judgment entered by a "properly convened" three-judge court "even though the decision of the District Court can be read as resting on its interpretation of the statute rather than squarely on constitutional grounds." Alexander v. Fioto, 430 U.S. 634, 636 (1977) (footnotes omitted). The instant case involves the enjoining of the operation of a state law (1973 Ga. Laws 2127) on federal statutory grounds, i.e., Section 5 of the Voting Rights Act of 1965, 42 U.S.C.

§ 1973c. Since this Court has held that "Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges," Allen v. State Board of Elections, 393 U.S. 544, 563 (1969), the three-judge court in the instant case was properly convened; and an appeal to this Court from the judgment of the three-judge court lies under 28 U.S.C. § 1253. Dothard v. Rawlinson, 433 U.S. 321, 324 n.5. See also, Philbrook v. Glodgett, 421 U.S. 707, 712 n.8 (1975); Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad, 382 U.S. 423, 428 (1966). In light of these decisions, the cases cited by

appellees in division I of their argument are inapposite.

II.

Appellees have premised their argument regarding 28 U.S.C. § 1253 on the assertion that the order appealed from in the case "is not one granting or denying injunctive relief, but rather an order denying a motion to set aside a previous order of the three-judge court granting summary judgment to Appellees." (M 6-7). They further contend that "the failure to specify in the notice of appeal the order sought to be reviewed should not be regarded as harmless error." (M 13 n.9). As set forth below, this Court should treat the appeal as being from the order granting summary judgment and enjoining the defendants

from further use of the voting plan in question, filed on December 1, 1981.

In Hoiness v. United States, 335 U.S. 297 (1948), the district court entered an order granting judgment on August 5, 1946, and filed "Findings of Fact and Conclusions of Law" on October 14, 1946. The petition for appeal referred to "the rulings, findings, judgment and decree made and entered herein on October 14, 1946." Id. at 300. This Court disregarded any alleged defect:

> It seems to us hypertechnical to say that the appeal papers did not bring the sole issue of the case fairly before the Court of Appeals. Thus the assignments of error framed in the appeal attacked the basis of the first order as well as the second. What appellant sought to have reviewed was plain.

> The failure to use the words August 5, 1946, if that be taken as the date of the final decision, was as insubstantial as a misspelling of the words would have been, since the words used identified the rulings which were challenged, and in no way altered the scope of review.

Id. at 301.

In State Farm Mutual Automobile Ins. Co. v. Palmer, 225 F.2d 876 (9 Cir. 1955) the Ninth Circuit held that an order denying a motion for new trial was not appealable and that failure to specify the judgment in the notice of appeal was fatal. Relying upon Hoiness and its earlier decision in United States v. Ellicott, 223 U.S. 524 (1912), this Court reversed per curiam. State Farm Mutual Automobile Ins. Co. v. Palmer,

350 U.S. 944 (1956).

Based upon these decisions of this Court, a number of United States Courts of Appeals have held that "a failure to designate the judgment complained of in the notice of appeal is not a fatal defect, if the intent of the appellant to appeal from the judgment may be inferred from the text of the notice, and if appellee has not been misled by the defect." Holz v. Smullan, 277 F.2d 58, 61 (7th Cir. 1960). Accord, Shell Oil Co. v. Federal Power Commission, 509 F.2d 176, 178 (5th Cir. 1975); Peabody Coal Co. v. Local Union No. 1734, 484 F.2d 78, 82-82 (6th Cir. 1973), cert denied, 430 U.S. 940 (1977); Serzysko v.

Chase Manhattan Bank, 461 F.2d 699, 701 (2d Cir. 1972), cert. denied, 409 U.S. 883 (1972); Lumbermen's Mutual Insurance Co. v. Massachusetts Bonding & Insurance Co., 310 F.2d 627, 629-30 (4th Cir. 1962); Cheney v. Moler, 285 F.2d 116, 117-18 (10th Cir. 1960); Donovan v. Esso Shipping Co., 259 F.2d 65, 67-68 (3d Cir. 1958); Railway Express Agency v. Epperson, 240 F.2d 189, 192 (8th Cir. 1957).

In the instant case, it is plain what appellants are seeking to have reviewed. Furthermore, "the only assignments of error that could be framed would attack the basis of the first order as well as that of the second." Altvater v. Battocletti, 300 F.2d 156, 158 (4th Cir. 1962).

In light of this fact and in light of the fact that appellees have argued the merits of the December 1, 1981, order in their Motion to Dismiss or Affirm, appellees have not been misled in this case and have not been prejudiced by any technical mistakes by appellants.

Because it is obvious that the intent of appellants was to appeal from the order entered on December 1, 1981, this Court has jurisdiction over the appeal.

III.

Appellees contend that "appellants failed to file a timely notice of appeal or one in conformity with the rules of this Court." (M 9). This contention is also without merit.

As discussed supra, appeal of this case is proper under 28 U.S.C. § 1253.

The facts of the instant case also demonstrate that an appeal can be taken under 42 U.S.C. § 1973c, Allen v. State Board of Elections, 393 U.S. 544 (1969). While it would probably have been better practice to specify both statutes in the notice of appeal (and also in the Jurisdictional Statement), failure to do so is harmless error. Appellees have cited no cases, and appellants are aware of none, where this Court has dismissed an appeal because the statute cited in the Jurisdictional Statement is not the same as the one set forth in the notice of appeal.

In Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32 (1966), the appeal was dismissed because it was docketed 22 days after the expiration of the 60-day period provided by this Court's rules. In the instant case, this Court's business has not been delayed by any alleged failure of the appellants to comply with the Rules, and "what appellant sought to have reviewed was plain." Hoiness v. United States, 335 U.S. 297, 301 (1948).

Because it is clear that this Court has jurisdiction over appeals from three-judge courts in cases involving § 5 of the Voting Rights Act, because (as discussed supra) an appeal alternatively lies under 28 U.S.C. § 1253, and because both the filing

of the notice of appeal and the docketing of the appeal were timely, there is no basis for dismissal of the appeal.

IV.

Several matters raised in division III of appellees' argument also require a response.

Appellees contend that because the Attorney General made a "determination that the 1973 act was a legislative plan," the question of retroactive application of McDaniel v. Sanchez, 101 S.Ct. 2224 (1981), is not an issue. (M 13-14). Appellees miss the point that the whole doctrine of retroactivity is based upon whether or not legal consequences should be attached "to patterns of

of conduct premised . . . on a different understanding of . . . judge-made law from the rule that ultimately prevailed." Lemon v. Kurtzman, 411 U.S. 192, 198 (1973) (plurality opinion). Although it is questionable whether or not the Attorney General ever "determined" that the 1973 act was "legislative," in any event such a determination could hardly rise to the level of "judge-made law."[3]

Appellees have cited the case of Morris v. Gressette, 432 U.S. 491

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[3]Appellees also assert that there has been "nine years of flouting the Voting Rights Act" and that therefore it "would be unconscionable" not to apply McDaniel v. Sanchez retroactively. (M 14 n.11). In response, appellants would point out the statement in Allen v. State Board of

(1977) for the proposition that "[t]he law is abundantly clear that determinations by the Attorney General under § 5 are final and are not subject to review" (M 15) and that appellants are therefore bound by the Attorney General's decision in 1973. However, the cited case does not apply to the instant case. The reapportionment of the South Carolina State Senate in Morris was clearly legislative, and no contention was raised in that case as to whether or not § 5 applied. Rather, it was assumed that

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[3]Continued . . . Elections, 393 U.S. 544 (1969), that "[t]he state enactments were not so clearly subject to § 5 that the appellees' failure to submit them for approval constituted deliberate defiance of the Act." Id. at 572.

§ 5 applied, and the case dealt with the issue of judicial review of a determination on the merits by the Attorney General in cases covered by § 5. Appellants assert that § 5 pre-clearance was not required in 1973 under then-applicable law, and the fact that a submission to the Attorney General was initially made can not change the fact that submission was not required. It is a basic rule of law that the parties can not waive a court's jurisdiction over the subject matter. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); Ahrens v. Clark, 335 U.S. 188, 193 (1948); United States v. Griffin, 303 U.S. 226, 229 (1938). This principle can be applied by analogy to cases such as this one, where the plan in question

was not subject to § 5 pre-clearance.

Contrary to the contentions of appellees, McDaniel v. Sanchez did establish a new principle of law, and the impact of McDaniel v. Sanchez on jurisdictions covered by the Voting Rights Act is quite relevant. See, Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971).

CONCLUSION

For the foregoing reasons, this appeal should not be dismissed, as it is clearly within this Court's jurisdiction. Furthermore, the questions presented regarding the retroactive application of McDaniel v. Sanchez are substantial; and the Court should note probable jurisdiction in order that these questions might be settled.

Respectfully submitted,

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